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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 584

EURUS CADY,

vs. *Appellant,*

THE STATE OF GEORGIA

STATEMENT OPPOSING JURISDICTION.

To The Honorable The Chief Justice, and The Associate Justices of the Supreme Court of the United States of America:

The Appellee submits its statement of the reasons why it contends that the Supreme Court of the United States should not assume jurisdiction upon the appeal for a review of the judgment of the above entitled cause.

Statement of the Case

Petitioner was convicted in the Superior Court of Coffee County, Georgia, at the October Term, 1943, for the offense of murder. He filed a motion for new trial, which was overruled. By writ of error the case was carried to the Su-

preme Court of the State of Georgia and the judgment of the trial Court was affirmed. A motion for rehearing was made but was denied.

The Appellant attacked the constitutionality of two State statutes under the Federal Constitution, (a) Section 59-106, and (b) Section 38-1604 of the Code of Georgia.

> "59-106. Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commisisoners shall revise the jury lists. The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

> "38-1604. Husband and wife shall not be competent or compellable to give evidence in any criminal proceeding for or against each other, except that either shall be competent, but not compellable, to testify against the other upon the trial for any criminal offense committed, or attempted to have been committed, upon the person of either by the other. The wife shall be a competent witness to testify for or against her husband in cases of abandonment of his child, as provided in section 74-9902."

Questions Involved

The Federal questions raised by Appellant are:

(a) That by the misinterpretation of section 59-106 of the Code of Georgia, and by consistently, wilfully, systematically, arbitrarily, and intentionally refusing and failing to select the name or names of any female, otherwise qualified, as jurors, notwithstanding there were such in the county who were free-holders and experienced, upright, and intelligent citizens, abridged the defendant's privileges or immunities and deprived him of his liberty without due process of law, and denied to him the equal protection of the laws all guaranteed by the XIV Amendment to the Constitution of the United States.

(b) That by the denial of the right of the wife of the defendant to testify after it had been stated into the record what her testimony would be and that it was material to the defense of the defendant, and the holding by the Supreme Court that Section 38-1604 of the Code of Georgia had deprived the Appellant of equal protection of the laws and due process of law guaranteed him by the XIV Amendment to the Constitution of the United States and guaranteed to him by Article 1, Section 1, Paragraph III of the Constitution of Georgia.

Brief and Citation of Authorities

Appellee respectfully urges that neither of these questions are such that this Court should take jurisdiction of the case because both of the grounds complained of are devoid of merit and the principle of law upon which they are based have already been decided by this Court in other cases so no further exposition is needed.

1. Appellant's complaint that the jury commissioners misinterpreted Section 59-106 "by consistently, wilfully,

systematically, arbitrarily and intentionally refusing and failing to select the name or names of any female, otherwise qualified, as jurors" is devoid of merit for the reason that the State of Georgia has another statute on which no attack on the constitutionality has been made, to-wit:

> "79-207. Females are entitled to the privilege of the elective franchise, to hold any civil office or perform any civil functions in as full and complete a manner as the same can be enjoyed by any male citizen: Provided, however, females shall not be liable to discharge any military, jury, police, patrol or road duty."

This statute was enacted in 1921, after the XIX Amendment had been adopted and its effect was to add to the list of the persons exempt from jury duty "all females" and the construction as to the validity of such exemption has already been decided by this Court in the case of

Rawlins v. *State,* 124 Ga. 31 (1)

affirmed in 201 U. S. 638, in which the Court held:

> "The board of jury commissioners may, in the exercise of their discretion, omit from the jury list of the county all persons who are exempted by law from jury service, as well as those whose business or avocation is such that it is reasonably probable that an excuse from jury service would be granted by the judge."

It will thus be seen that this case is identical in point with the Rawlins case and that the Rawlins case has already decided the question which the Appellant seeks to raise.

2. Appellant's question No. 2 is also devoid of merit and merely raises the question as to whether a State may enact laws specifying what witnesses shall be competent to testify and what evidence shall be received in the courts

of its State. This question likewise was decided in the case of

Hawes v. *State of Georgia*, 42 Sup. Ct. Reporter 204, 258 U. S. 1

where the Court held:

> "It has been decided, as counsel concede, that the Legislature may make one fact prima facie evidence of another, and it is certainly within the established power of a state to prescribe the evidence which is to be received in the courts of its own government. Adams v. New York, 192 U. S. 585, 588, 24 Sup. Ct. 372, 48 L. Ed. 575."

In the Hawes case the identical question as to competency of the husband and wife to give evidence against each other was collaterally involved.

We, therefore, suggest that this question has already been determined by this Court and needs no further elucidation.

Wherefore, Appellee urges that no jurisdiction be taken of this case.

Respectfully submitted,

T. Grady Head,
Attorney General of Georgia;
Victor Davidson,
Assistant Attorney General of Georgia.